PENDAFTAR HAKMILIK NEGERI KEDAH

v.

OVERSEAS-CHINESE BANKING CORP. LTD.

SUPREME COURT, KUALA LUMPUR
GUNN CHIT TUAN SCJ, MOHAMED AZMI SCJ, MOHD. JEMURI SERJAN SCJ
[SC CIVIL APPEAL NO. 01-39 OF 1990]
30 MARCH 1991

LAND LAW: *Debt owed by registered proprietor to Federation - Registrar's caveat - Earlier registered charges - Priority - Indefeasibility of chargee's rights - Discretion of Registrar - Ultra vires - National Land Code 1965, ss. 320(1)(ba), 418*

REVENUE LAW: *Income tax owed by chargor of land - Registrar's caveat - Earlier registered charges - Priority - Discretion of Registrar - Ultra vires - Government Proceedings Act 1956, ss. 10(1),(2).*

Between 1971 and 1982, the chargor T had executed 4 charges over the said land to the respondent OCBC to secure various loans; all these charges were registered. On 18 August 1986, pursuant to a request by the department of inland revenue (DIR), Kedah, the Registrar, R, entered a Registrar's caveat under s. 320 of the National Land Code (NLC) on the said land on the ground that T owed income tax to the DIR. T was advised of the entry of R's caveat on 19 April 1987.

On 3 April 1987, OCBC obtained an order for sale of the said land to satisfy monies owed by T. As a result of receipt of a letter from R confirming the entry of R's caveat, OCBC under s. 18 of the NLC, filed a notice of motion appealing R's decision to enter the caveat. OCBC was only officially notified of the existence of R's caveat on 4 October 1989 *vide* Form 19A.

OCBC's appeal was allowed by the High Court by His Honour K.C. Vohrah J whereby His Honour held that R had wrongfully exercised his discretion under s. 320(1)(ba); R's caveat was ordered to be cancelled [1990] 2 CLJ (Rep) 594. R appeals on the ground that the trial Judge had erred in law in the interpretation of s. 320(1)(ba) of the NLC.

Held:

[1] In order for R to decide whether the said land will be available to satisfy the whole or part of the debt owed to the DIR, R must obtain certain relevant information before exercising his discretion under s. 320(1)(ba) namely:

(a) the market value of the land in question;

(b) the amount of debt due on any registered charge or charges; and

(c) the value of the debt owed to the government

[2] If the debt due on any prior charge or charges exceeds the market value of the land, it cannot be seen how the land in question would be available to satisfy the whole or any part of the debt due to the Federation, bearing in mind the indefeasible interest of the chargee under s. 340 of the NLC.

[3] (a) As R had failed to take into account relevant considerations, he had not exercised his discretionary powers according to and within the limits set out in s. 320(1)(ba) of the NLC;

(b) as R had not acted judiciously or reasonably within the ambit and scope of that section, he has therefore exceeded his powers under that section and has therefore acted *ultra vires* and his act was therefore invalid.

[R's appeal dismissed.]

Legislation referred to:

National Land Code 1965, ss. 321(2), 320(1)(ba), 340, 418, 431(1)(c)

For the appellant - Haji Abdul Malik bin Haji Ishak, Penasihat Undang-undang Negeri Kedah Darulaman

For the respondent - Porres P. Royan (Mary S. Nitchingham with him); M/s. Shook Lin & Bok

JUDGMENT

Gunn Chit Tuan SCJ:

This appeal was the result of the entry of a Registrar's caveat under the provisions of s. 320(1)(ba) of the National Land Code 1965. The facts of the case were that as far back as 8 February 1971, one Tan Bok Lean, the chargor, executed a legal charge over his property No. SPB Grant 64992 Mukim of Alor Setar, Kota Setar, in favour of the Overseas Chinese Banking Corporation Limited (hereinafter referred to as the respondent) to secure a loan of RM30,000. The said charge was registered on 8 March 1971. On 12 September 1974, Tan Bok Lean executed a second legal charge over the same property to secure a loan of RM15,000. The said charge was registered on 16 September 1974. On 8 September 1979, a third legal charge was executed in favour of the respondent to secure another loan of RM15,000 over and above the existing loans of RM45,000. The third legal charge was registered on 23 September 1979. Finally a fourth legal charge was executed on 19 May 1982, in favour of the respondent again to secure another loan of RM60,000 over and above the existing loans of RM60,000. That legal charge was registered on 26 May 1982.

On 14 August 1986, the Registrar of Titles, Kedah (hereinafter referred to as the appellant), received a letter from the department of inland revenue, Alor Setar, Kedah, requesting him to enter a Registrar's caveat under s. 320 of the National Land Code in respect of the said property of Tan Bok Lean on the grounds that he, Tan Bok Lean:

> ada berhutang cukai pendapatan kepada jabatan ini dan belum lagi jelas jumlah berkenaan. Untuk menjaga kepentingan Kerajaan dalam hal ini, sila tuan masukkan kewet Pendaftar di bawah s.320 Kanun Tanah Negara.

On 18 August 1986, at 10.00 a.m. a Registrar's caveat was entered against the said property and the department of inland revenue, Alor Setar, Kedah was so informed by a letter from the appellant dated 18 August 1986. Tan Bok Lean himself was also informed of the entry of the Registrar's caveat on 19 April 1987, by way of service of a notice under s. 431(1)(c) of the National Land Code. The said notice was in Form 19A in accordance with the provisions of s. 321(2) of the said Code.

However on 3 April 1988, the respondent obtained an order for sale of the said property to satisfy the sum of RM126,048.19 due from Tan Bok Lean as at 8 February 1987, with interest at 12.75% per annum on monthly rests to date of realisation. The respondent only received a letter dated 14 August 1989, in reply from the appellant confirming the entry of a Registrar's caveat against the said property, and on 20 September 1989, it proceeded to file a notice of motion in Court to appeal under s. 418 of the National Land Code against the appellant's decision to enter the said caveat. The respondent was then also served with a Form 19A on

4 October 1989 to inform it officially of the entry of the Registrar's caveat. The said notice of motion was heard by the High Court at Alor Setar on 14 February 1990, when decision was reserved to 22 April 1990, on which date the respondent's appeal was allowed and the Registrar's caveat was ordered by the High Court to be cancelled and that costs incidental to the application be taxed and paid by the appellant.

The appellant, being dissatisfied with the decision of K.C. Vohrah J appealed against the whole of the said decision on 25 April 1990, and in its memorandum of appeal dated 5 June 1990, raised the following ground of appeal:

> Y.A. Hakim yang membicarakan kes silap di sisi undang-undang semasa menafsirkan peruntukan s. 320(1)(ba) Kanun Tanah Negara.

It was not disputed that the Registrar's functions under the provisions of s. 320 of the National Land Code are not exclusively ministerial and that he exercises a discretion, albeit not totally unfettered, which is quasi-judicial in nature. It was also not disputed in this case that the Registrar did not make his decision *mala fide* when he entered the caveat against the said property. After hearing submissions of Counsel, the learned Judge considered the issue was whether the Registrar had acted *ultra vires* his powers under s. 320(1)(ba) of the National Land Code when he entered the said caveat and came to the conclusion that the Registrar had failed to take into proper consideration the fact that there were charges on the said land as well as other matters and that his decision to enter the Registrar's caveat in the context of the *ultra vires* doctrine was not proper. His Lordship therefore allowed the appeal to the High Court and ordered that the Registrar's caveat be cancelled.

It was the contention of Dato' Haji Abdul Malik bin Haji Ishak, the learned Legal Adviser, Negeri Kedah Darulaman, before us that the learned Judge had erred in holding that in the instant case the Registrar in entering the caveat had wrongly exercised his discretion under s. 320(1)(ba) of the National Land Code because once there is a charge in respect of the land, the Registrar's caveat is incapable of being entered in respect of the land for it could not possibly appear, according to K.C. Vohrah J, "necessary or desirable" to the Registrar

> for securing that the land will be available to satisfy the whole or any part of the debt due to the Federation since the caveat will not transform an unsecured debt into a secured debt, let alone give a priority over other registered interests in the land.

Be that as it may, on examination of the appeal records in this case, we found in para. 6 of the affidavit-in-reply of Haji Ghazali bin Haji Yahya, the Registrar of Land Titles, Alor Setar, Kedah Darulaman, dated 11 October 1989, a reference to the letter received by him from the department of inland revenue dated 14 August 1986. That letter was marked as an exhibit to his affidavit and was as follows:

> Tuan,
>
> **Tan Bok Lean (k/p 2228552)**
> **Kewet Pendaftar Seksyen 320 K.T.N.**
>
> Berhubung dengan perkara dan sipenama di atas sila maklumkan bahawa beliau ada berhutang cukai pendapatan kepada Jabatan ini dan belum lagi jelas jumlah berkenaan. Untuk menjaga kepentingan kerajaan dalam hal ini sila tuan masukkan Kewet Pendaftar di bawah s. 320 Kanun Tanah Negara di atas harta harta berikut:
>
> | **Geran** | **Mukim** | **Daerah** |
> |---|---|---|
> | SP. 64992 | Alor Setar | Kota Setar |

The Registrar then stated in paras. 7 and 8 of his said affidavit that upon receiving the said exhibit referred to above, it appeared to him:

> that it was necessary to protect the interests of the Federation and it was also apparent that taking into consideration the provisions of subs. (1)(ba) of s. 320 of the National Land Code 1965, the said land belonging to the said Tan Bok Lean will be available to satisfy the whole or part of any debt due to the Jabatan Hasil Dalam Negeri. Having ascertained that the said land was registered in the name of Tan Bok Lean, the Registrar duly entered a Registrar's caveat on 18 August 1986.

Having perused the judgment, we cannot but agree with the learned Judge when he stated that:

> the Registrar did not rely on anything beyond the letter of the department of inland revenue requesting for his caveat to be lodged on Tan Bok Lean's land. The letter itself states precious little. We know that for the purpose of para. (ba) of s. 320(1) whether the debt is secured or unsecured is an irrelevant consideration to be taken into account. Also irrelevant is whether judgment on the debt has been obtained. But while the lack of information on these matters is not material, it does not follow that other material matters should not be taken into account for the purposes of the provision.

We are of the view that the learned Judge was not wrong in law when he considered the provisions of s. 320(1)(ba) of the National Land Code and stated as follows later on in his judgment:

> In the context of looking at the value of the residue that would be available to the owner of the land after a sale of the land it is reasonable to expect the Registrar to be seized of the value of the debt owed to the Government, the value of the land and the value of the debt for which the charges on the land were created. He cannot act on airy fairy surmises nor can he make unwarranted inferences from information which is scanty.
>
> If the value of the charges in respect of the land equals or exceeds the value of the land there cannot be any surplus for the landowner and it is hard to see how it can possibly appear to the Registrar that it would be necessary or desirable for securing that the land 'will be available to satisfy the whole or part of' the debt due to the Government. Thus the Registrar has to have vitally important information relating to the value of the Government debt, the land and the debt or debts covered by the charges before he can make a proper decision whether to enter the Registrar's caveat.

In this case, it would appear to us, as it did to the Registrar, that it was necessary or desirable to secure that the land in question will be available to satisfy a debt due to the Federation. But in order to enable him to decide whether that land will be available to satisfy the whole or part of the debt due to the Federation, surely he must find out before exercising his discretion under the provisions of s. 320(1)(ba) of the National Land Code the market value of the land in question, the amount of debt due on any registered charge or charges and also the value of the debt owed to the Government. If the debt due on any prior charge or charges exceeds the market value of the land, then we too like the learned Judge cannot see how the land in question would be available to satisfy the whole or any part of any debt due to the Federation bearing in mind the indefeasible interest of the chargee under s. 340 of the National Land Code. In this case, the Registrar had decided to enter the Registrar's caveat against the land in question without all those information on several material matters which need to be considered by him before he decided to enter the Registrar's caveat.

He had therefore not exercised his discretionary powers according to and within the limits set out in the provisions of s. 320(1)(ba) of the National Land Code because he had failed to take relevant considerations into account. As he has not acted judiciously or reasonably within the ambit and scope of that section, he has therefore exceeded his powers under that section and has therefore acted *ultra vires* and his act was therefore invalid. The learned Judge was therefore correct in ordering the said Registrar's caveat to be cancelled under s. 418 of the National Land Code and we would therefore also dismiss this appeal with costs.

Also found at [1991] 2 CLJ 1105